Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1997

WILLIAM O. GENDREAU,

Petitioner,

v.

COLLEEN RAE GENDREAU,

Respondent.

Appendix A
Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

Appendix A
PETITION FOR WRIT OF CERTIORARI

JOHN R. MARTZ, LTD.
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105 pp

APPENDIX A

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

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U.S.BANKRUPTCY COURT
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JOHN R. MARTZ, LTD.
John R. Martz, Esq.
440 Ridge St., Suite 3
Reno, Nevada 89501
(702) 329-4554
Nevada Bar #327

In Re:

WILLIAM O. GENDREAU,

Debtor.

WILLIAM O. GENDREAU,

Plaintiff,

v. JUDGEMENT

COLLEEN RAE GENDREAU,
et. al.,

Defendants.

APP. 2

Chapter 7
Case No. 93-31897
Adversary No. 93-03119
Hrg. Date: May 3, 1994
and Time: 2:00 p.m.

Upon Motion and Cross-Motion for Summary Judgment filed by Plaintiff William O. Gendreau,

Judgment is granted in favor of Ms. Gendreau and against Mr. Gendreau on the question of dischargeability of pension claims. Ms. Gendreau's right to pension payments is nondischargeable;

Judgment is granted in favor of Mr. Gendreau and against Ms. Gendreau on the question of the claim for an award of attorney's fees. The award of attorney's fees per the Divorce Decree is a dischargeable debt.

DATED this 7th day of July, **1994**.

"S/James H.Thompson".
UNITED STATES BANKRUPTCY JUDGE

Appendix B

ORDERED PUBLISHED

FILED
Jan 31 1996 C.A.
Nancy B. Dickerson, Clerk
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re

WILLIAM O. GENDREAU,

Debtor.

WILLIAM O. GENDREAU,

Appellant,

V. AMENDED OPINION

COLLEEN RAE GENDREAU,

Appellee.

APP. 4

BAP No. Nv-94-1832-HaMeAs

Bankruptcy No. 93-31897-JHT

Adversary No. 93-3119

Submitted Without Oral Argument
on March 22, 1995

Opinion Filed: December 14, 1995
Amended Opinion Filed: -JAN 3 1 1996

Appeal from the United States Bankruptcy
Court
for the District of Nevada

Hon. James H. Thompson, Bankruptcy
Judge, Presiding

Before: HAGAN, MEYERS and ASHLAND,
Bankruptcy Judges

MEYERS, Bankruptcy Judge:

Chapter 7 bankruptcy debtor William Gendreau ("Debtor") filed a complaint against his former spouse Colleen Gendreau ("Appellee") for a declaratory

judgment that his obligation to pay pension plan benefits to her pursuant to their divorce decree was a dischargeable debt. on opposing motions for summary judgment, the bankruptcy court held that the Appellee's right to a portion of the Debtor's pension benefits was not subject to discharge.

We AFFIRM.

II
FACTS

The Debtor has been employed by United Airlines, Inc. ("United") since 1966. The Debtor and the Appellee were married in 1985.

A divorce decree was entered by the Family Court for Loudoun County, Virginia on October 2, 1992. The decree determined that a portion of the Debtor's two pension plans provided by United was marital property, and awarded 50 percent of this marital property to the Appellee. On January 25, 1993, the court entered an order entitled "Qualified Domestic Relations Order" (the "Order"). The Order provided that it was intended to be a qualified domestic relations order ("QDRO") pursuant to 29 U.S.C. section 1056(d) . The Order also stated:

> "This court specifically retains jurisdiction to establish or maintain this Order as a Qualified Domestic Relations Order."

The administrator of the United pension plans was served with a copy of the Order. On May 17, 1993, Scott Zapel, Senior Counsel for the United pension plans, sent a letter to the Appellee stating that the Order was not a QDRO as defined in the statutes. The letter outlined the reasons for this conclusion: (1) the official plans' names were wrong; (2) the Appellee's address appeared to be wrong; and (3) there were two methods for calculating payments due the Appellee, both of which were ambiguous, with no indication as to which method to use if the two methods led to differing results. The letter provided that the Appellee could commence benefits within 60 days after a clarified QDRO was approved by the pension plan administrator.

The Debtor filed a Chapter 7 bankruptcy petition on November 15, 1993. The Appellee had not obtained a clarified QDRO. On November 29, 1993, the Debtor filed a complaint seeking a declaratory judgment that the Appellee's right to payment from the United pension plans was a debt dischargeable in bankruptcy. The Debtor subsequently

filed a motion for summary judgment and the Appellee filed a cross-motion for summary judgment.
The bankruptcy court denied the Debtor's motion and granted the Appellee's cross-motion for summary judgment. The Debtor appeals.

III
STANDARD OF REVIEW

Given that the court granted summary judgment on a legal question of statutory interpretation, and the essential facts are undisputed, we review the court's decision de novo. Matter of Pacific Far East Line, Inc., 713 F.2d 476, 478 (9th Cir. 1983).

IV
DISCUSSION

The issue of whether the Appellee's right to a portion of the Debtor's pension plans benefits is dischargeable centers on whether this right should be characterized as a prepetition claim against the Debtor. 11 U.S.C. section 727(b) states that, except as provided in 11 U. S..C. section 523 (a) , a discharge under Section 727 (a) discharges a debtor from all debts that

arose before bankruptcy.[1] The Bankruptcy Code defines a "debt" as a "liability on a claim." 11 U.S.C. S 101(12). Pursuant to 11 U.S.C. S 101(5), a "claim" is defined as:

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
>
> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

Congress intended by the language used in Section 101 to adopt the broadest available definition of the term "claim. 11 Johnson v. Home State Bank, 501 U.S.

---

[1] The parties agree that Section 523(a)(5) would not except the obligation from discharge, as the pension benefit award was not in the nature of maintenance or support. Also, Section 523(a) (15), established by the Bankruptcy Reform Act of 1994, does not apply because this case was filed before the effective date of the Act. Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106, Sec. 702.

78, 83 (1991). We must decide whether the Appellee has a dischargeable claim against the Debtor.

A. There Was No Claim Against the Debtor

In In re Teichman, 774 F. 2d 1395 (9th Cir. 1985), a dissolution decree ordered the debtor to pay his former wife a percentage of his retirement benefits. The debtor failed to pay her $14,000 of the benefits he received prepetition and refused to pay her any benefits given to him postpetition. The debtor argued that his obligations to his ex-wife were discharged. The Court of Appeals held that the $14,000 debt owed by the debtor to his wife prepetition was discharged, but that the right to a percentage of the debtor's monthly pension benefits postpetition was not a debt subject to discharge. The court explained that under the dissolution decree, the wife had an ownership interest in a portion of the retirement fund. Since the postpetition payments were not debts under the Code, the court concluded that they were not subject to discharge. 774 F.2d at 1398. The court in Bush v. Taylor, 912 F.2d 989, 993 (8th Cir. 1990), also held that the former spouse's interest in postpetition

pension payments was not dischargeable, for the reasons given in Teichman.

In this case, the Appellee is not asking for any monies paid to the Debtor prepetition. In fact, the Debtor did not receive any pension benefits prepetition. Under the rationale in Teichman and Bush, the right to a portion of these postpetition payments is not a debt owed by the Debtor and therefore not subject to discharge under Section 727(b).

As both Teichman and Bush involved government pensions, the Employee Retirement Income Security Act of 1974 ("ERISA") did not apply in those cases. The Dissent attempts to distinguish Teichman and Bush on this basis, and also on the ground that those decisions noted that a property interest had been created in the pension plans prepetition. As explained below, we do not find the distinctions material. The decisions were premised on the fact that payment from the pension was not owed by the Debtor at the time the bankruptcy petition was filed and therefore there was no debt to discharge. Here, also, the Debtor had no liability to the Appellee. Under the Teichman and Bush holdings, there was no debt for the Debtor to discharge.[1]

---

[1] The dissent misinterprets our reliance on Teichman and Bush. We do not cite these cases for the invalid proposition that debts are not

Regardless of when the payments came due, no debt was created because the Appellee did not have a claim against the Debtor. We disagree with the Debtor's argument that because the Appellee did not have a QDRO when the bankruptcy petition was filed, the pension funds were the Debtor's property against which the Appellee merely had a claim.

The Debtor points out that the anti-alienation provision in ERISA precludes assignment of the pension benefits to the Appellee unless she has a valid QDRO. See 29 U.S.C. S 1056(d)(1) ("[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated"). ERISA's prohibition on the assignment or alienation of pension benefits has been strictly enforced. Patterson v. Shumate, 504 U.S. 753, 760 (1992); Guidry v. Sheet Metal Workers Pension Fund, 493 U.S. 365, 372 (1990).

A QDRO is an express exception to ERISA's anti-alienation provision. See ERISA section 1056 (d) (3) (B) (i) (I); In re Abbata, 157 B. R. 201, 205 (N.N.Y. 1993). Domestic relations orders which are not QDRO's are subject to the anti-assignment provision. 29 U.S.C. section

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subject to discharge if they are contingent or unmatured. Rather, we believe Teichman and Bush support our determination that a right to pension benefits is not a claim against the debtor.

1056(d)(3)(A); Ablamis v. Roper, 937 F.2d 1450, 1454 (9th Cir. 1991). 29 U.S.C. section 1056(d)(3)(B)(i) defines a "qualified domestic relations order" as a domestic relations order

> (I) which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan, and
>
> (II) with respect to which the requirements of subparagraphs (C) and (D) are met.....

Subparagraphs (C) and (D), referenced above, specify what details the order must include, such as the name and address of the participant and alternate payee, the amount of benefits to be paid and the method of payment.

The pension plan administrator is charged with the initial responsibility to determine whether an order is a QDRO. See 29 U.S.C. section 1056(d)(3)(G). Here, although the Virginia state court originally deemed the order a QDRO, the

pension plan administrator did not.[1] The Debtor argues that rather than having a property right in the pension plans, the Appellee had a contingent right to payment, which was a claim as broadly defined in the Bankruptcy Code. Under the Debtor's analysis, his liability on the claim was discharged under 11 U.S.C. S 727(d).

A bankruptcy discharge operates to discharge all debts that were the personal liability of the debtor. 11 U.S.C. section 524; In re Raiman, 172 B.R. 933, 936 (9th Cir. BAP 1994). The Debtor incorrectly assumes that he had an unlimited right to all the pension funds, and that the Appellee's purported "contingent right to payment" was from the Debtor, rather than from United's pension plans. This also seems to be the premise relied upon by the Dissent. What the Debtor and the Dissent fail to recognize is that United, not the Debtor, controlled the funds. The Order provides that the amounts awarded to the Appellee by the Order "shall be separately accounted for..... until the benefits are distributed. . . ." The Order further states:

---

[1] We need not decide whether the Order is a QDRO, but see no reason to question the dissent's thoughtful analysis of the issue.

> "The benefits awarded by this Order shall not be assigned, pledged, or otherwise transferred, voluntarily or involuntarily, before [the Appellee] has received those benefits."

Moreover, the ERISA statute itself precluded the Debtor from reaching that part of the pension in dispute. 29 U.S.C. section 1056(d)(3)(H)(i) provides that during any period in which the issue of whether an order is a QDRO is being determined by the plan administrator, by a court of competent jurisdiction or otherwise, the plan administrator shall segregate in a separate account the amounts which would be payable to the alternate payee if the order is determined to be a QDRO. Section 1132 (a) (1)(B) and (e)(1) of the ERISA statute provides that a beneficiary may bring a civil action in state or-district court to recover pension benefits, enforce her rights or clarify her rights to future benefits under the pension plans.

Here, the family court's order and the ERISA statute expressly limited the Debtor's right to the disputed funds. The plan administrator was to safeguard the disputed pension funds until a determination was made as to whether the

order was a QDRO. The Debtor was not entitled to the funds until such a determination was made. To obtain the pension funds, the Appellee would file a civil court action against the administrator. The Appellee's claim is against United, not the Debtor. Accordingly, there is no claim subject to discharge in bankruptcy.

It is true that under 11 U.S.C.S 541 (c)(2), as construed in Patterson v. Shumate, supra, a debtor may exclude his interest in an ERISA-qualified pension plan from the property of the bankruptcy estate. Yet the Debtor's interest in the United pension plans was limited under the state court order and the ERISA statute. When a debtor's ultimate right to receive property is measured by or dependent upon orders which would be issued by a state court, the bankruptcy estate is subject to these rights and the bankruptcy filing cannot enlarge them. In re Keller, 185 B.R. 796, 799 (9th Cir. BAP 1995). The Bankruptcy Code neither creates nor enhances the property rights a debtor brings into the bankruptcy estate. In re Braker, 125 B.R. 798, 801 (9th Cir. BAP 1991). A debtor may not discharge debts against property in which he does not have a legal or equitable interest. See 11 U.S.C. section 541 (a)(1) . In this case, on the petition filing date the Debtor was entitled to only a percentage of the

pension funds, with the remaining portion of the pension subject to the Appellee's right to obtain a QDRO. The ERISA statute recognizes this in section 1056 (d)(3)(H), by ordering that pension funds be segregated for up to 18 months while the status of an order as a QDRO is being determined and by acknowledging that this process may take longer than 18 months.

The Debtor's property right in the pension funds did not increase upon filing the bankruptcy petition. A debtor's interest in property which was divided in a dissolution judgment prepetition is "fixed and limited by the divorce decree." Matter of Paderewski, 564 F.2d 1353, 1357 (9th Cir. 1977) (Bankruptcy Act case). The debtor "cannot claim title to a greater interest than that awarded" him in the divorce decree. 564 F.2d at 1356-57.

> "Once dissolution has been accomplished. . . the final judgment is res judicata as to the division of property and is binding on the bankruptcy trustee."

In re Keller, supra, 185 B.R. at 800. In Keller, we held that once the family court ordered the debtor's residence sold and retained jurisdiction to

approve disbursement of the proceeds, "those proceeds were for all practical purposes held in custodia legis by that court." Id. As such, the Panel deemed the proceeds "beyond the reach of the debtor" and "not part of the bankruptcy estate." Id. Here, at the time the Debtor filed his bankruptcy petition, the pension proceeds were, according to both the ERISA procedures and the Virginia family court's order, beyond the reach of the Debtor.

In sum, the Debtor argues that the ERISA statute abrogates the Appellee's interest in the pension plans awarded under state court order because the Appellee did not have a QDRO on the date the Debtor filed for bankruptcy relief. Because ERISA anticipates that entry of a QDRO may be a time-consuming process and provides for segregation of funds during the first 18 months of that process, we do not believe Congress ever meant to allow a pensioner to bypass that process and essentially nullify a state court order by filing a bankruptcy petition. The ERISA statute respects state court orders. We will not, in the guise of complying with ERISA, invalidate the Order.

B. Other Decisions Have Reiected the Debtor's Argument

The two reported decisions concerning a bankruptcy petition filed before entry of a QDRO have rejected the argument that the right to receive a QDRO was a claim against the debtor subject to discharge. Like the instant case, In re Long, 148 B.R. 904 (W.Mo. 1992), involved a domestic relations order which did not meet all the technical requirements of a QDRO. The court found a property right created in the decree of dissolution, namely the right to obtain a QDRO and transfer legal ownership of a portion of the debtor's pensions. 148 B.R. at 908. The court held that the right to secure a QDRO was fixed when the divorce decree became final, and could not be discharged as a debt. Id. The court explained that entry of the QDRO would not alter the amount of marital property awarded or otherwise affect the finality of judgment. The court concluded that because there was no debtor-creditor relationship between the parties arising from the property settlement, entry of a QDRO was more akin to enforcement of a property right than to collection of a prepetition debt. 148 B.R. at 907-08.

The other decision adopting this view is In re Brown, 168 B.R. 331 (N.Ill. 1994). In that case, the court held that although the debtor's ex-wife had no recognizable legal right under ERISA to the debtor's pension benefits

because she was unable to obtain the QDRO prepetition, she did have an equitable interest in the debtor's pensions arising from entry of the decree of dissolution. 168 B.R. at 335-36 n.6. The court ruled that the former spouse's equitable interest in the pension fund was neither property of the debtor at the time the bankruptcy petition was filed, nor property of the bankruptcy estate. 168 B.R. at 336.

We agree with the above-cited decisions: the right to the pension benefits arose when the divorce decree was entered, and was not, as the Debtor argues, dependent on an order satisfying the technical requirements detailed by the plan administrator.[1]

C. Our Ruling Is Consistent with Congressional Intent

Construing the Order as awarding a property right rather than a claim is consistent with the legislative history of 29 U.S.C. S 1056. One-of Congress's primary purposes in enacting the QDRO

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[1] The Dissent, focusing on the QDRO procedures in ERISA, appears to view these procedures as akin to lien perfection. Under the Dissent's reasoning, until a beneficiary perfects her interest by obtaining a QDRO, she has no recognizable interest in the pension benefits. In contrast, our understanding of ERISA is that it acknowledges the beneficiary's interest in the pension benefits even before she has complied with the detailed provisions for obtaining a QDRO.

exception to ERISA's prohibition on assignment and alienation was to safeguard the financial security of women dependent on their husbands' earnings in the case of divorce or separation. Ablamis v. Roper, supra, 937 F.2d at 1453, 1456-57. Congress intended that a former spouse could obtain an enforceable pension interest with a QDRO and presumably realized that processing of the QDRO could be slow.

In re Long, supra, 148 B.R. at 909. As stated in Bush v. Taylor, sulora, 912 F.2d at 994:

> "We doubt that Congress ever intended that a former wife's judicially decreed sole and separate property interest in a pension payable to her former husband should be subservient to the Bankruptcy Code's goal of giving the debtor a fresh start."

The purpose of the detailed statutory language in defining QDRO's is to spare ERISA plan administrators who, due to ambiguities as to the identity of the beneficiaries designated in a divorce decree, pay the wrong person and are sued by a rival claimants Metropolitan Life Ins. Co. v. Wheaton, 42 F.3d 1080, 1084 (7th Cir. 1994). The Debtor is attempting to misapply the

statute to achieve a result Congress certainly never intended: to gain a windfall for himself in contravention of a state court order and at the expense of his former wife.[1] The Appellee's right to receive a portion of the pension funds should not be forfeited merely because the Debtor filed his bankruptcy petition before the right paperwork was submitted. The ruling urged by the Debtor in this case could encourage other debtors to frustrate a state court's pension award to the former spouse by manipulating the timing of bankruptcy to stay entry of a QDRO. In re Loncr, supra, 148 B.R. at 910. A debtor's attempt to use the bankruptcy discharge as a "sword" to take unfair advantage, rather than as a "shield" to protect him with a fresh start, should not be countenanced. See In re Pieri, 86 B.R. 208, 213 (9th Cir. BAP 1988).

D. Our Ruling Is in Accord with Non-ERISA Decisions

Having ruled that ERISA should not be interpreted to let the Debtor discharge the Appellee's right to pension benefits in bankruptcy, we also note that under state law the Debtor

---

[1] Because the pension funds are exempt assets, a determination that the right to pension benefits is dischargeable would not increase estate assets for the benefit of creditors.

could not discharge this right in bankruptcy. Because nonbankruptcy law determines the nature and extent of the debtor's interest in property, Butner v. United States, 440 U.S. 48, 54-55 (1979), courts have looked at how state law and the divorce decree define the interest in pension benefits. In In re Chandlei, 805 F.2d 555, 556 (5th Cir. 1986), the court recognized that the divorce decree awarded the pension benefits as the former wife's sole and separate property, which was permissible under Texas law. The court held that the portion of the debtor's monthly Army retirement benefits awarded to his former wife pursuant to a divorce decree was not dischargeable as debt because it was the sole property of the debtor's former spouse. Similarly, in In re Zick, 123 B.R. 825, 829 (E.Wis. 1990), the court held that

> "the divorce court did not create an obligation of the husband to the wife as part of a property division that he can now discharge. The court awarded Peggy Zick a portion of the pension fund in her husband's name; it became her property, not his."

And in In re Thomas, 47 B.R. 27, 33 (S.Cal. 1984)(Meyers, J.), the court

found military pension benefits nondischargeable, for the reason that they were deemed to be the property of the debtor's former wife under California law. See also In re Brown, supra, 168 B.R. at 334 (applying Illinois law to find a property right in the debtor's pension).

In the case at hand, the divorce decree and the Order granted the Appellee a property right in the pension. The Virginia family court directed the pension plan administrator to award the Appellee her portion of the benefits. There was no implication that the Debtor owed money to the Appellee. Furthermore, the plan administrator's assertion that there were technical problems with the Order does not alter the fact that the Appellee was awarded a portion of the pension. Under Virginia law, the substantive terms of a final divorce decree dividing a pension are not subject to modification. Caudle v. Caudle, 18 Va.App. 795, 796, 447 S.E.2d 247, 248-49 (1994). A trial court may modify a final decree to effectuate its expressed intent regarding pension benefits, but any adjustment must be consistent with the substantive provisions of the original decree. 18 Va.App. at 798, 447 S.E.2d at 249. Accordingly, under Virginia law the Appellee could ask the state court to modify the order to comply with the plan

administrator's technical requirements. Indeed, the Order reserved jurisdiction for the family court to establish it as a QDRO. The Debtor has not argued that the Appellee is time-barred from either requesting that the Order be modified to alleviate the United plan administrator's concerns, or from bringing suit in state or district court to establish that the Order as it presently reads is a QDRO.

CONCLUSION

Our reading of the relevant provisions of the Bankruptcy Code and the ERISA statute, along with the legislative history and policy behind their enactment, leads us to conclude that the Appellee's property right in the pension is not dischargeable, despite any technical deficiencies in the Order.

Because the Debtor did not owe a debt to the Appellee, there was nothing to discharge. The court's summary judgment in favor of the Appellee is AFFIRMED.

HAGAN, Bankruptcy Judge, dissenting:

My analysis of the applicable law would mandate a reversal of the order

appealed. I therefore respectfully dissent. The order stating that the Appellee had a property interest in the Debtor's pension plan was not a Qualified Domestic Relations order; it could not create a property interest in the pension plan; and therefore it was a debt discharged in bankruptcy.

DISCUSSION

1. The Appellee Could Not Obtain an Interest in the United Pension Plans in the Absence of a ODRO.

The majority opinion properly notes that the Order did not create a debt that was nondischargeable under section 523 as being "in the nature of alimony, maintenance, or support." 11 U.S.C. section 523(a)(5)(B).[1] The Order constituted a property settlement. "Property settlements . . . are dischargeable in bankruptcy." *E.g., Stedman v. Pederson (In re Pederson),* 875 F.2d 781, 784 (9th Cir. 1989), overruled *on other grounds, Fa,rrey v. Sanderfoot,* 500 U.S. 291 (1991). In *Pederson,* the Ninth Circuit Court of Appeals relied in part on this provision

[1] Unless otherwise noted, all references to "section" are to the respective section of the Bankruptcy Code, Title 11, United States Code.

to permit the debtor to avoid a lien securing a property settlement obtained through a divorce.

> Because the award was not in the nature of alimony, maintenance or support, it would have been dischargeable in bankruptcy under section 523(a)(5). Allowing Pederson to avoid a lien securing such a dischargeable property settlement is thus consistent with Congress's policy "that property settlements should-be treated the same as other debts in bankruptcy."

875 F.2d at 784 (quoting *Boyd v. Robinson,* 741 F.2d 1112, 1116 (8th Cir. 1984) (Ross, J., dissenting)).

This case therefore turns upon whether the Appellee has a presently vested property interest in the pension plans, or if her right to obtain such a property interest is a "debt" within the meaning of the Bankruptcy Code. If it is a debt, it will be discharged. 11 U.S.C. section 727(b).

2. The ERISA Anti-Alienation Provision.

It is undisputed that the United pension plans are subject to the Employee Retirement Income Security Act of 1974 ("ERISA"). Pub. Law 93-406, 88

Stat. 829, as amended, 29 U.S.C. section 1001 et seq. Section 1056 of Title 29, United States Code, provides that "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated." 29 U.S.C. section 1056(d)(1); *see also* 26 U.S.C. section 401(a)(13)(A). This section is expressly applicable to domestic relations orders:

> Paragraph (1) shall apply to the creation, assignment, or recognition of a right to any benefit payable with respect to a participant pursuant to a domestic relations order, except that paragraph (1) shall not apply if the order is determined to be a qualified domestic relations order. Each pension plan shall provide for the payment of benefits in accordance with the applicable requirements of any qualified domestic relations order.

29 U.S.C. section 1056(d)(3)(A); *see also* 26 U.S.C. section 401(a)(13)(B). A "domestic relations order" is defined as:

> any judgment, decree, or order (including approval of a property settlement agreement) which--

> (I) relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant, and
>
> (II) is made pursuant to a State domestic relations law (including a community property law).

29 U.S.C. section 1056(d)(3)(B)(ii); see also 26 U.S.C. section 414(p)(1)(B). It is undisputed that the Order is a "domestic relations order."

A QDRO is defined by 29 U.S.C. section 1056 in the following manner:

> (i) the term "qualified domestic relations order" means a domestic relations order--
>
> (I) which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan, and
>
> (II) with respect to which the requirements of

> subparagraphs (C) and (D) are met[.]

29 U.S.C. section 1056(d)(3)(B)(i); -- see *also* 26 U.S.C. section 414(p)(1)(A). The plan administrator is charged with initial responsibility for determining whether an order is a QDRO. 29 U.S.C. section 1056(d)(3)(G), (H); 26 U.S.C. section 414(p)(6), (7).

These sections "supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan. . .11 29 U.S.C. section 1144(a). That section goes on to clarify the nature of ERISA's preemption of state law, providing in part that:

> For purposes of this section:
> (1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. . . .
> (2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.

29 U.S.C. section 1144(c). QDRO's are expressly excepted from preemption. 29 U.S.C. section 1144(b)(7).

3. The Order Is Not A ODRO.

The majority opinion correctly concedes that the Order is not a QDRO. As noted, a domestic relations order must meet the requirements of two subparagraphs to be a QDRO. 29 U.S.C. section 1056(d)(3)(B)(i)(II); *see also* 26 U.S.C. section 414(p)(1)(A)(ii). These subparagraphs provide:

> (C) A domestic relations order meets the requirements of this subparagraph only if such order clearly specifies–
>
> (i) The name and the last known mailing address (if any) of the participant and the name and
> (if any) of the participant and the name and mailing address of each alternate payee covered by the order,
>
> (ii) the amount or percentage of the participant's benefits to be paid by the plan to each such alternate payee, or the manner in which such amount or percentage is to be determined,

(iii) the number of payments or period to which such order applies, and

(iv) each plan to which such order applies.

(D) A domestic relations order meets the requirements of this subparagraph only if such order--

(i) does not require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan,

(ii) does not require the plan to provide increased benefits (determined on the basis of actuarial value), and

(iii) does not require the payment of benefits to an alternate payee which are required to be paid to another alternate payee under another order previously determined to be a qualified domestic relations order.

29 U.S.C. section 1056(d)(3)(C), (D); *see also* 26 U.S.C. section 414(p)(2), (3).

It is no accident that ERISA requires that the order "clearly specif[y]" certain information. 29 U.S.C. section 1056(d)(3)(C) (emphasis added); *see also* 26 U.S.C. section 414(p)(2) (same).

> The statutory language is explicit and emphatic. The purpose is to reduce the expense of ERISA plans by sparing plan administrators the grief they experience when because of uncertainty concerning the identity of the beneficiary they pay the wrong person, or arguably the wrong person, and are sued by a rival claimant.

Metropolitan Life Ins. Co. v. Wheaton, 42 F.3d 1080, 1084 (7th Cir. 1994).

> "[T]he . . . requirement that certain facts be specified clearly serves the purpose of aiding plan administrators in determining whether certain domestic relations orders are covered by the limited exception to the antialienation and preemption rules."

Hawkins v. Commissioner of Internal Revenue, 102 T.C. 61, 74-75 (1994). *See also S.* Rep. No. 98-575, 98th Cong., 2d Sess. 19, reprinted in 1984 U.S.C.C.A.N. 2547, 2565 (guidelines to determine whether the QDRO exception to the anti-assignment provision applies are "necessary" "[i]n order to provide rational rules for plan administrators".)

"[W]e conclude that a QDRO should be 'clear and specific' and not 'left to determination by inference or conjecture.' To allow otherwise would be to spawn again la relentless stream of litigation'." *Hawkins*, 102 T.C. at 73. Among other things, a QDRO must clearly specify either the amount or percentage of benefits to be paid to the alternate payee, or the method by which that amount or percentage is to be calculated. 29 U.S.C. section 1056(d)(3)(C)(ii); *see also* 26 U.S.C. section 414(p)(2)(B) (same). The terms of the Order by no means met this requirement, for reasons discussed in a footnote.[1]

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[1] The following are some of the more serious ambiguities found in the Order. First, the Order contains two conflicting formulae for computing the benefits to be paid to the Appellee. Paragraph 1 of the Order provides on page 2 that "the Defendant [Appellee] is entitled to one-half of the marital shares, that being 50%of 13.71% of each of the aforesaid properties." Paragraph 2 contains a second formula by which the Appellee's interest is calculated. The denominator is the total number of months of the Debtor's total length of employment until he retires and begins to receive his pension benefits. The numerator is the total number of months the Appellee and the Debtor were married. This fraction is converted to a percentage, of which the Appellee is entitled to receive one half. The Order does not indicate which formula the plan administrator should use.

This is particularly problematic, since the second formula reaches a significantly different result from the first. Interpreting the second formula according to its most probable meaning gives the following result, based on facts found in the Order. The marital share of the property covers the period from December 3, 1985, to August

Despite the concession that the order does not constitute a QDRO, the

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16, 1990, a total of 57 months. The Order states the Debtor began working at United in August, 19966, and is eligible to retire with benefits on April 1, 1999, a total length of employment of 392 months. If these figures are inserted into the fractional formula, the result is 57/392 or 14.54%. This is significantly higher than the 13.71% figure used in paragraph 1. Differing figures maybe obtained depending on how partial months are counted; however, none of these figures equals 13.71%, and the Order does not specify how partial months should be counted.

Other ambiguities exist. As noted, paragraph 1 states that "The Defendant [Appellee] is entitled to one-half of the marital shares, that being 50% of 13.71% of each of the aforesaid properties." This language could be read to say either that the award is of one-half of 13.71% of the plans, or of one-half of 50% of 13.71% of the plans.

The denominator of the second formula in paragraph 2 on page 2 is ambiguous. The Order provides the Appellee may elect to receive benefits as of the earliest date the Debtor could retire. The Debtor has already passed his early retirement date, so pension benefits to the Appellee would be payable immediately. However, the Debtor has not retired. Because the denominator of the second formula is the number of months until the Debtor's retirement, the denominator cannot be calculated. (It should be noted that the record includes the exceptions made by counsel to entry of the Order, and that Debtor's counsel specifically excepted to the Order on precisely this ground.)

Paragraph 1 on page 5 of the Order confuses the situation further. It states the Appellee is awarded "[a] sum equal to fifty percent (50%) of the amount allocated according to the formula described hereinabove." Two ambiguities exist. First, as noted, this paragraph does not specify whether the formula is the percentage described in paragraph 1, or the fractional percentage described in paragraph 2. Second, this paragraph can be read as further halving the sums already halved in both the previous formulae. For example, the second, fractional formula provides that the Appellee is entitled to one-half of the fraction. Paragraph 1 on page 5 would suggest the Appellee was entitled to only one-half of that amount, or one-quarter of the fraction.

majority opinion characterizes the deficiencies in the order as being "technical" in nature, and even suggests that the requirements were peculiar to the plan administrator. The requirements are not "technical" in the sense of being mere details. They are the defining characteristics of a QDRO, and compliance is mandatory.

4. A Domestic Relations Order That Is Not A ODRO Cannot Create A Property Interest In An ERISA-Oualified Pension Plan.

The critical issue, therefore, is whether a domestic relations order that is not a QDRO could nonetheless act to transfer a property interest in an ERISA pension plan. The majority opinion correctly notes that it cannot. In *Ablamis v. Roper,* 937 F.2d 1450 (9th Cir. 1991), a husband owned a pension plan in which the wife allegedly had a community property interest. The wife died, leaving her share of the community property to a trust. The question presented was whether a nonparticipant spouse could bequeath an interest in the pension plan.

The Ninth Circuit Court of Appeals held such a transfer was not permitted, as the provisions of ERISA preempted any

state law permitting such a transfer. The only possible exception to the anti-alienation provision of 29 U.S.C. section 1056(d)(1) was a QDRO. 937 F.2d at 1454. The Court of Appeals noted that the provisions regarding QDRO's had been added by the Retirement Equity Act of 1984 ("RFA"), Pub. Law 98-397, 98 Stat. 1426. 937 F.2d at 1453. After an extensive discussion of the authorities, the court summarized its conclusion as follows:

> Given the specific language of ERISA, the legislative history of REA, and the Supreme Court's clear holdings regarding the applicability of anti-assignment provisions to spousal transfers, we have no doubt whatsoever that S 1056(d) of ERISA is generally applicable to transfers involving spouses and necessarily preempts all orders relating to such transfers that do not fall within the specific and limited QDRO exception set forth in REA. Orders that do not qualify under that exception contravene the direct language of ERISA's anti-assignment provision.

937 F.2d at 1459.

One of the cases relied upon by *Ablamis* is *Guidry v. Sheet Metal Workers Nat'l Pension Fund,* 493 U.S. 365 (1990). There, a union official had embezzle funds from the union. The union obtained a constructive trust against the officials pension plan. The Supreme Court held that the constructive trust violated the anti-alienation provision of ERISA. Noting that writs of garnishment against an ERISA pension plan are proscribed by the anti -alienation provision, the Court held:

> "We see no meaningful distinction between a writ of garnishment and the constructive trust remedy imposed in this case. That remedy is thereby prohibited by section 206(d)(1) [29 U.S.C. section 1056(d)(1)] unless some exception to the general statutory ban is applicable." 493 U.S. at 372. The Court held there was no general equitable exception to the anti-alienation provision. 493 U.S. at 376-77. "Section 206(d) [29 U.S.C. section 1056(d)] reflects a considered congressional policy choice . . . . If exceptions to this policy are to be made, it is for Congress to undertake that task." 493 U.S. at 376 (footnote omitted). The Supreme Court later cited *Guidry* as demonstrating that

> the Court "vigorously has enforced ERISA's prohibition on the assignment or alienation of pension benefits, declining to recognize any implied exceptions to the broad statutory bar." *Patterson v. Shumate,* 504 U.S. 753, 760 (1992).

5. Summary: The Appellee Had A Claim Against The Debtor That Was Discharged.

In my opinion, this settles the matter. In the divorce, the Appellee had a right to obtain a portion of the Debtor's property. This was a "claim" under section 101(5). The state court attempted to award a property interest in the Debtor's pension plans as part of the property settlement, but it failed to do so. on the petition date, the Appellee's right to obtain a property interest in the Debtor's pension plans was no different from an unsecured judgment creditor's right to levy against a judgment debtor's property. Under section 524, that right was discharged.

The majority opinion reaches a different result, contending that (1) the Debtor's property interest in the pension plans had been limited by the award to the Appellee, and (2) the Appellee's right to a portion of the

pension plans was not a "claim." Both of these arguments are flawed.

6. Neither The Order Nor ERISA Limited The Debtor's Property Interest In The Pension Plans.

The larger portion of the majority opinion is devoted to the assertion that the Debtor has no property interest in that portion of the United pensions awarded to the Appellee. Because "the Debtor's interest in the United pension plan[s] was limited under the state court order and the ERISA statute," the majority opinion contends, "on the petition filing date the Debtor was entitled to only a percentage of the pension funds, with the remaining portion of the pension[s] subject to the Appellee's right to obtain a QDRO." I disagree.

The majority opinion first contends that two provisions of the Order restricted the Debtor's property interest in the pension plans, or otherwise limited the Debtor's access to the plans. The Order provided that (1) the amounts awarded to the Appellee were to be separately accounted for until the Appellee received her benefits; and (2) the benefits awarded by the order could not be transferred, voluntarily or involuntarily, until distributed to the Appellee.

These terms of the Order are irrelevant, since they have no legal effect. As already noted, ERISA supersedes state law, or other State action having the meaning any "decisions - - - or other State action having the effect of law" issued by any state "instrumentality . . . which purports to regulate, directly or indirectly, the terms and conditions" of an ERISA-qualified pension plan. 29 U.S.C. S 1144(a), (c)(1), (c)(2). A segregation requirement did apply temporarily (see the discussion beginning in the next paragraph); however, this temporary restriction was in no way a product of the order, but only of ERISA, and the Order was ineffective to extend the restriction in any manner.

The majority opinion next turns to several provisions of ERISA that allegedly restricted the Debtor's property interest in the pension plans. During the period where a plan administrator or court of competent jurisdiction is determining whether an order qualifies as a QDRO, the majority opinion notes, the plan administrator is required to segregate in a separate account funds that would have been payable to the alternate payee if the order in fact is a QDRO. By this the majority opinion suggests that the existence of the order caused

ERISA to limit the Debtor's property interest in the pension plans, even-though the order was not a QDRO.

I cannot agree with this conclusion. If an order presented to a plan administrator is determined not to be a QDRO (or if 18 months elapse from the time benefits would first be payable under the order), the duty to segregate is terminated and the plan administrator must pay such funds over to the plan participant.[1] Thus, the segregation of funds does not protect alternate payees whose order does not qualify as a QDRO. Even alternate payees with QDRO's only receive protection if the QDRO issue is resolved within 18 months.

This provision demonstrates that ERISA does not limit the plan participant's property rights in the absence of a QDRO. Limited segregation[2]

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[1] The relevant portion of ERISA provides:

> (iii) If within 18-month period described in clause (v)
>
> (I) It is determined that the order is not a qualified domestic relations order, or
>
> (II) the issue as to whether such order is a qualified domestic relations order is not resolved,
>
> then the plan administrator shall pay the segregated amounts (including any interest thereon) to the person or persons who would have been entitled to such amounts if there had been no order. 29 U.S.C. section 1056 (d) (3) (H) (iii). See also 26 U.S,.C. section 414 (p) (7) [c] (same).

[2] Segregation applies only to benefits that would have been paid to the alternate payee during the time the plan administrator is considering

is provided as a protection against irreparable-harm for alternate payees who have a QDRO. Alternate payees whose order does not qualify as a QDRO do not receive the benefit of this minimal protection. ERISA does not limit the Debtor's property interest in the pension plans, as the majority opinion contends; these provisions again demonstrate that the Debtor's property interest in the pension plans is unlimited in the absence of a QDRO.

Moreover, the "segregated fund" argument would not affect the result here even if the logic of the argument were accepted. It appears from the record that the Debtor was not receiving plan benefits during the time that the plan administrator was evaluating whether the Order was a QDRO. Thus, the plan administrator would not have segregated any benefits for the Appellee. Even if plan benefits had been segregated, that segregation terminated approximately six months before the debtor filed bankruptcy, when the plan administrator rejected the order as a QDRO. With no funds

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whether the order is a QDRO. Se 29 U.S.C. section 1056 (d) (3) (H) (I) (during the time the plan administrator is determining whether an order is a QDRO, "The plan administrator shall separately account for the amounts...which would have been payable to the alternate payee *during such period* if the order had been determined to be a qualified domestic relations order.") (emphasis added); 26 U.S.C. section 414 (p) (7) (a) (same).

segregated on the petition date, ERISA neither created nor recognized any limitation on the Debtor's interest in the United pension plans.[1]

The restrictions set forth in the Order were preempted by ERISA, and of no legal effect. Contrary to the majority opinion's suggestion, ERISA itself demonstrates that alternate payees receive no protection in the absence of a QDRO. Even if the logic of the majority opinion's argument was accepted, no portion of the Debtor's pension plans was subject to segregation on the petition date. I therefore must reject the majority opinion's conclusion that the Debtor's property interest in the pension plans was limited on the petition date.

7. The Appellee's Right To Plan Benefits Was A "Claim" Against The Debtor.

The majority opinion also contends that the Appellee did not have a claim against the Debtor, because the obligation to pay pension benefits was not due at the time the Debtor filed bankruptcy. In support, the majority opinion cites *Teichman v. Teichman (in*

[1] Note in addition that the limitation on the Debtor's property interest in the pension plans would not be the full amount awarded the Appellee, but only the segregated amounts, i.e, those benefits that would have been payable until the QDRO issue was resolved.

re Teichman), 774 F.2d 1395 (9th Cir. 1985), and the alternative holding in *Bush v. Taylor*, 912 F.2d 989 (8th Cir. 1990). This position contradicts the plain language of the statutory definition of "claim," and fails to properly interpret either *Teichman or Bush*, both of which were non-ERISA cases where a property interest had been created in the pension plan prepetition.

The majority opinion provides a quite thorough discussion of the definition of "claim," noting the breadth that is accorded that term. I would further note that the term "claim" expressly includes "unmatured" rights to payment. 11 U.S.C. section 101(5)(A). "Claim" also includes "contingent" rights to payment, id., meaning a debt "'which the debtor will be called upon to pay only upon the occurrence or happening of an extrinsic event which will trigger the liability of the debtor to the alleged creditor."' *Fostvedt v. Dow (In re Fostvedt)*, 823 F.2d 305, 306 (9th Cir. 1987) (quoting *Brockenbrough v. Commissioner*, 61 B.R. 685, 686 (W.D. Va. 1986)) (interpreting 11 U.S.C. S 109(e)). Thus the plain language of the statutory definition of "claim" includes obligations where payment is not yet due. By holding that the Appellee has no "claim" because pension benefits will only be paid in the future, the majority opinion effectively allows a debtor's

unmatured obligations to pass through bankruptcy without being discharged--a radical narrowing of the scope of bankruptcy relief.

A closer examination of *Teichman and* Bush demonstrates that neither case reached this result. In *Teichman,* the Ninth Circuit Court of Appeals addressed the question of whether a husband could discharge through bankruptcy the obligation to convey a percentage of his military pension to his former wife. Unlike here, however, the wife had a perfected property interest in half the pension from the effective date of the state court's order.

> "The district court correctly held that under the dissolution decree, the wife has an ownership interest in forty-three percent of the retirement fund." 774 F.2d at 1398.

However, the state court could not order the United States to make direct payments to the wife of her share; instead, it had to order the husband to turn over the wife's share of the payments after the husband received each check. 774 F.2d at 1398.

For this reason, the obligation to turn over the proceeds was not a debt. Each check the husband received from the pension, although made payable to him,

in fact contained the wife's proceeds. The husband had no property interest in the wife's share of the proceeds. The obligation to pay the wife was not a payment of a debt owing the wife, but a transfer of the wife's property to her possession. This obligation arose only upon the receipt of the check, and therefore was not a debt. 774 F.2d at 1398.

Bush v. Taylor, 912 F.2d 989 (8th Cir. 1990), is distinguishable for exactly the same reasons. In *Bush,* the wife was awarded a one-half interest in the husband's government pension plan. 912 F.2d at 990. As in *Teichman,* the government mailed a check for the full amount each month to the husband, who was then obligated to pay over to the wife her portion of the check. 912 F.2d at 990. (The obligations between the husband and wife were later modified in a manner not relevant here.) The husband subsequently filed a petition for relief in bankruptcy. The Eighth Circuit held, in an alternative holding relying upon *Teichman,* that the bankruptcy discharge had no effect on the husband's obligation to remit the wife's portion of future pension payments, because those payments were not yet due and payable. 912 F.2d at 993.

In both *Teichman and Bush* the wife had obtained a property interest

prepetition, through the state court's order dividing the community property. Neither case involved ERISA, so the state court order was immediately effective in this regard. In the present case, the order was ineffective to create the property interest found in *Teichman and* Bush, because the Order was not a QDRO. The majority opinion misapplies Teichman and *Bush* to undercut the plain definition of "claim," a result that neither court intended.[1]

The majority opinion also relies upon two lower court decisions. *Bigelow v. Brown (In re Brown)*, 168 B.R. 331 (Bankr. N.D. Ill. 1994); *Long v. Donahue (In re Long)*, 148 B.R. 904 (Bankr. W.D. Mo. 1992).In Long, the court cited the statutory definitions of "debt" and "claim," and then stated that the former spouse "has something other than a right to payment from the Debtor or his property." 148 B.R. at 908. The court then stated:

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[1] The majority opinion asserts that it relies upon Teichman and Bush for the proposition that the Appellee does not have a claim against the Debtor. I cannot agree. The Debtor has a valuable property interest in the pension plans; the Order itself is premised on that fact. The Appellee currently lacks any property interest in the Debtor's pension plans, but seeks to use her unsecured judgment to obtain a portion of the Debtor's property. This is a claim against the Debtor. See 11 U.S.C. section 102 (2) (rule of construction in Title 11 is that "'claim against the debtor' includes [a] claim against property of the debtor"); Johnson v. Home State Bank, 501 U.S. 78, 84-86 (1991) (mortgagee's right to foreclose is a claim, even though the debtor's personal liability has been discharged).

> As discussed above, a domestic relations order not in the form of a QDRO does not create an enforceable right to benefits against an ERISA qualified pension; therefore, Ms. Donahue's right to obtain a QDRO can not be classified as a debt. The Decree of Dissolution gave Ms. Donahue a right to obtain the QDRO and transfer legal ownership of her portion of Debtor's pensions awarded as marital property.

148 B.R. at 908. In other words, the Long court held that since there is no enforceable right to payment in the absence of a QDRO, there is no "debt."

> "To hold that a claim for contribution arises only when there is an enforceable right to payment appears to ignore the breadth of the statutory definition of 'claim."'

California *Dep't of Health Services v. Jensen (In re Jensen)*, 995 F.2d 925, 929 (9th Cir. 1993) (rejecting contention that liability for environmental contamination was not a "claim" until response costs had been incurred). Although a right to payment is unenforceable in the absence of a QDRO, this does not mean that the

Appellee has no right to payment. "Right to payment" is not determined by the creditor's ability to immediately levy on property without any further court action, but rather on the creditor's legal right to obtain payment. As previously noted, "claim" includes both contingent and unmatured obligations. An unsecured creditor without a judgment has a "claim," even though the creditor has no current right to garnish the debtor's wages or levy against the debtor's property. 11 U.S.C. section 101(5)(A)("whether or not such right is reduced to judgment . . . .unliquidated,….[or] disputed."). The Appellee has both a right to payment and a state court judgment recognizing that right. The Appellee's right to obtain a QDRO is analogous to a judgment creditor's right to attach the debtor's property--a final step necessary to actually obtain satisfaction of the right to payment.

Long attempted to distinguish Guidry, holding a constructive trust could be imposed because the nondebtor spouse had a right to obtain a QDRO. 148 B.R. at 909. *Guidry* expressly stated that a constructive trust could not be imposed unless an exception to the anti-alienation provision applied. 493 U.S. at 372. Unqualified domestic relations orders are not excepted from the anti-alienation provision.

In *Brown*, the court held that a dissolution decree immediately divides the property, with the nondebtor spouse obtaining an ownership interest. 168 B.R. at 334-35. The debtor spouse holds the nondebtor's interest in the pension plan in constructive trust. 168 B.R. at 335.

> "In fact, upon entry of the divorce judgment, the benefits became the sole and separate property of the Plaintiff. . . The QDRO merely served to enforce her preexisting property rights in the pension." Id. (citation omitted).

The court noted the ERISA anti-alienation provision, but stated:

> "(A]lthough the Plaintiff had no recognizable legal right under ERISA to the debtor's pension benefits because she was unable to obtain the QDRO prepetition, the Plaintiff did have an equitable *interest* in the Debtor's pensions arising from the entry of the decree of dissolution."

168 B.R. at 336 n.6 (emphasis in original). Brown simply begs the question, stating that a constructive

trust is created even though Guidry says it cannot be, and holding that an equitable property interest exists despite the plain language of the anti-alienation provision.[1]

8. ERISA Preemption Conditions General Statements of The Law Regarding Property Rights.

In support of its conclusion that the award of property was effective in the absence of a QDRO, the majority opinion also cites to, or quotes from, numerous cases involving state law. The majority opinion cites *Keller v. Keller (In re Keller)*, 185 B.R. 796, 799 (9th Cir. BAP 1995), for the proposition that when a debtor's ultimate right to receive property is measured by or dependent upon orders which would be issued by a state court, the bankruptcy estate is subject to these rights and the bankruptcy filing cannot enlarge them. Here it is the Appellee, not the Debtor, whose ultimate right to receive property is measured by or dependent on a state court order. Regardless,

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[1] The majority opinion briefly cites Zick v. Zick (In re Zick), 123 B.R. 825 (Bankr. E.D. Wis. 1990). Zick also involved a QDRO obtained postpetition. See 123 B.R. at 828. The Zick court merely made the conclusory allegation that the state court's award gave the wife a property interest in the pension plan, without ever recognizing or addressing the ERISA anti-alienation provision. 123 B.R. at 829.

however, Keller is distinguishable, as it involved property that was *in custodia legis* on the date of the bankruptcy petition.

The majority opinion later cites both Keller and Paderewski v. Barrett *(In re Paderewski)*, 564 F.2d 1353 (9th Cir. 1977), for the proposition that the divorce decree conclusively established the property interests of the Debtor and the Appellee. I have no disagreement with the proposition that state law usually controls such matters. However, neither Keller *nor Paderewski* involved ERISA, nor do they suggest that bankruptcy courts should ignore an express federal preemption statute when evaluating property rights. The majority opinion uses Keller *and Paderewski* to avoid the ERISA preemption issue, rather than address it.

9. The Legislative History Does Not Support A Rejection of ERISA's Plain Language.

The majority opinion contends that its result is consistent with the legislative history of 29 U.S.C. section 1056, noting that one purpose of the QDRO exception was to safeguard the financial security of former spouses of plan participants Where the statute is clear, there is no need to inquire into the legislative history. See, *e.g.*,

Patterson v. Shumate, 504 U.S. 753, 761 (1992). ERISA plainly and unambiguously provides that unqualified domestic relations orders do not create any property interest. "Domestic relations order" is a defined term in ERISA, yet Congress excepted from the anti-alienation provision only the subcategory of qualified domestic relations orders. Congress clearly foresaw that there would be domestic relations orders that were not qualified, and directed that those orders were to be of no effect. *E.g.*, *Ablamis*, 937 F.2d at 1458 ("Thus, it is readily apparent that transfers pursuant to state domestic relations laws or rules not exempted under the QDRO exception are governed by the anti-assignment provision. (emphasis in original)). It is difficult to imagine Congress speaking more clearly on the issue. A domestic relations order that is not a QDRO does not create any property interest in an ERISA-qualified pension plan.[1]

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[1] The legislative history of the REA amendments that added the QDRO requirements also supports this conclusion.

> Under the bill, if a domestic relations order requires the distribution of all or a part or a participant's benefits under a qualified plan to an alternate payee, then the creation, recognition, or assignment of the alternate payee's right to the benefits is not considered an

The Supreme Court recognized this when it warned, in the specific context of the ERISA anti-alienation provision, against the creation of equitable exceptions to unqualified legislative requirements or prohibitions.

> The creation of such exceptions, in our view, would be especially problematic in the context of an antigarnishment provision. Such a provision acts, by definition, to hinder the collection of a lawful debt. A restriction on garnishment therefore can be defended only on the view that the effectuation of certain broad social policies sometimes takes precedence over the desire to do equity between particular parties. It makes little sense to adopt such a policy and then to refuse enforcement whenever enforcement appears inequitable.

Guidry, 493 U.S. at 376-77 (emphasis in original).

The majority opinion also raises the spectre of debtors manipulating the

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assignment or alienation of benefits under the plan if and only if the order is a qualified domestic relations order.

S. Rep. No. 98-575, 98th Cong., 2d Sess. 19, reprinted in 1984 U.S.C.C.A.N. 2547, 2565 (emphasis added).

time of filing bankruptcy to deprive spouses of an award of pension benefits. There is no basis for this fear. Section 523 was amended in 1994 to make property settlements nondischargeable in bankruptcy. Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 304(e), 108 Stat. 4106, 4133 (1994), *codified* at 11 U.S.C. section 523(a)(15). This amendment applies to all bankruptcy cases filed after October 22, 1994. Id., *section* 702(b)(1), 108 Stat. at 4150. only cases filed before that date would be affected by this decision.

CONCLUSION

The Order was not a QDRO, did not create a property interest, and therefore is a dischargeable debt. I would REVERSE the Bankruptcy Court's award of summary judgment to the Appellee.

APPENDIX C

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: WILLIAM O. GENDREAU,

Debtor.

WILLIAM O. GENDREAU,

Appellant,

v.

OPINION

COLLEEN RAE GENDREAU,

Appellee.

No. 96-15432
BAP No. NV-94-01832-HMcAs

Appeal from the Ninth Circuit
Bankruptcy Appellate Panel
Meyers, Ashland, and Hagan, Judges,
Presiding

APP. 57

Argued and Submitted
May 7, 1997-San Francisco, Califomia

Filed August 15, 1997

Before: Procter Hug, Jr., Chief Judge,
Herbert Y.C. Choy,
and Michael Daly Hawkins, Circuit
Judges.

Opinion by Judge Choy

SUMMARY

Bankruptcy/Family Law

The court of appeals affirmed a judgment of the bankruptcy appellate panel (BAP). The court held that a state court's qualified domestic relations order (QDRO) for a pension plan administrator to pay a portion of a bankruptcy debtor's pension funds to a spouse does not qualify as a "debt" subject to discharge.

A Virginia court issued a divorce decree awarding appellee Colleen

Gendreau a 50 percent interest in money accrued by appellant William Gendreau in his United Pilot's pension plans while they were married. The court also entered a QDRO directing the plan administrator to pay Colleen directly. The QDRO was intended to satisfy an exception to the anti-alienation provisions of the Employee Retirement Income Security Act (ERISA). The administrator determined that the court's order did not meet the criteria for a QDRO and refused to pay Colleen until he received a satisfactory payment order.

William filed for bankruptcy protection. Two weeks later he filed a declaratory action against Colleen alleging that Colleen's award of part of his pension-plan benefits was a dischargeable debt. Both sides moved for summary judgment.

The bankruptcy court denied William's motion and granted Colleen's, ruling that the plan administrator's obligation under the QDRO was not a claim against William's bankruptcy estate that could be discharged. The BAP affirmed.

William appealed, contending that because ERISA's anti-alienation rule barred Colleen from acquiring a property

interest in his pension plan unless she had a QDRO, she had only a right to obtain a QDRO and a payment. In William's view, this fit the Bankruptcy Code's definition of a debt.

[1] ERISA prohibits the assignment or alienation of pension benefits. However, Congress excepted QDROs from ERISA's anti-alienation rule. Domestic relations orders must meet specific requirements to qualify as QDROS.

[2]The QDRO exception was enacted to protect the financial security of divorcees. Because Congress was also concemed with reducing the expense to plan providers and protecting them from suits for making improper payments, it required that QDROs be specific and clear, and allowed plan administrators to approve the QDRO before they would be required to act in accordance with it.

[3] The Bankruptcy Code provides for the discharge of all debts that are the personal liability of the debtor. Debt is defined as a liability on a claim, and claim is broadly defined to include a right to payment. Debts incurred as a result of divorce, including property settlement debts, are dischargeable except to the extent they represent obligations in the nature of alimony, maintenance, or support. The award of

pension plan benefits may constitute a property settlement that will be is charged in bankruptcy if it is a debt.

[4]Colleen's interest was not a dischargeable debt. Her claim was against the United Pilot's pension plans, not against William. The claim was therefore not a personal liability of William. [5] If the plans failed to pay Colleen, her recourse would have been to sue the plans, not William. In no way could William have been personally liable to Colleen for the money.

[6] if not a proper QDRO, the order at least gave Colleen a right to obtain one that could not be discharged. Colleen's interest was established under state law at the time of the divorce decree. William's interest in the plans was limited at that time, or at least subject to being limited at any time Colleen obtained a QDRO. Whether or not Colleen's domestic relations order was a QDRO as issued was irrelevant: the QDRO provisions of ERISA did not suggest that Colleen had no interest in the plans until she obtained a QDRO; they merely prevented her from enforcing her interest until the QDRO was obtained. William did not file bankruptcy before Colleen had an interest in the plans- he

filed before the plan administrator was authorized to pay her. Colleen did not have an unmatured "debt," but a claim to her own interest in the plans.

[7] Allowing William to cut off Colleen's interest because of the timing of his bankruptcy would have been contrary to both ERISA and bankruptcy purposes. [8] The purpose of the QDRO to protect the fmancial security of divorcees would have been meaningless if William could have thwarted his spouse's interest by filing bankruptcy before she obtained a QDRO. The result would have been a windfall to William and would not have furthered bankruptcy's goal of accumulating a pool of assets to be distributed among creditors. Discharging Colleen's interest in the plans would not have enlarged the pool of assets.

COUNSEL

John R. Martz, Reno, Nevada, for the appellant.

Gus W. Flangas, Las Vegas, Nevada, for the appellee.

OPINION

CHOY, Circuit Judge:

Appellant William O. Gendreau ("William") appeals the grant of summary judgment in favor of appellee Colleen R. Gendreau ("Colleen") by the United States Bankruptcy Court and the subsequent affirmance by the Bankruptcy Appellate Panel ("BAP") of the Ninth Circuit.

FACTUAL AND PROCEDURAL BACKGROUND

William and Colleen were married in 1985. In 1992 they were divorced. The Family Court for Loudoun County, Virginia, issued a divorce decree, awarding Colleen a fifty percent interest in amounts William accrued in his two United Pilot's pension plans during the years they were married. The Family Court did not award either party maintenance or spousal support.

In January, 1993, the Family Court entered an order entitled "Qualified Domestic Relations Order" ("QDRO"), which was intended to satisfy an exception to the Employee Retirement Income Security Act's ("ERISA") prohibition against the alienation of pension plan funds. The order directed the plans' administrator to pay Colleen directly her percentage of the pension funds. On May 17, 1993, the administrator determined that the payment order did not meet the specific

criteria of a QDRO and refused to pay out funds to Colleen until he received an amended payment order that was approved as a QDRO.

On November 15, 1993, William filed a petition under Chapter 7 of the United States Bankruptcy Code, 11 U.S.C. § 701, *et. seq.* On November 29, William filed suit seeking a declaratory judgment that Colleen's award of part of his pension plans benefits was a dischargeable debt. Both parties filed motions for summary judgment. After a hearing on the matter, the bankruptcy judge entered an order denying William's motion and granting Colleen's. William appealed the grant of summary judgment in favor of Colleen. The BAP affirmed, finding that there was no claim against the debtor, William, to be discharged in bankruptcy. *In re Gendreau, 191* B.R. 798 (9th Cir. BAP 1995).

William timely filed an appeal in this court. Having reviewed the bankruptcy court's conclusions of law de novo, *see* In *re Alsberg,* 68 F.3d 312, 314 (9th Cir. 1995), *cert. denied,* 116 S. Ct. 1568 (1996), and its findings of fact for clear error, *see id.*, we affirm.

DISCUSSION

[1] At issue is whether William's bankruptcy petition cut off any rights Colleen may have in a portion of William's pension proceeds that were awarded to her in the divorce. ERISA was promulgated to protect participants in private employee benefit plans. 29 U.S.C. § 1001. ERISA strictly prohibits the assignment or alienation of pension benefits. 29 U.S.C. § *1056(d)(1); see also Patterson v. Shumate,* 504 U.S. 753, 760 (1992); *Guidry v. Sheet Metal Workers Nat'l Pension Fund,* 493 U.S. 365, 372 (1990). However, Congress expressly excepted QDROs from ERISA's anti-alienation rule. 29 U.S.C. § 1056(d)(3)(A). Domestic relations orders must meet specific requirements in order to qualify as QDROS. *See* 29 U.S.C. § 1056(d)(3)(B).

[2] The QDRO exception was enacted to protect the fmancial security of divorcees. *Ablamis v. Roper,* 937 F.2d 1450, 1453 (9th Cir. 1991). Because Congress was also concerned with reducing the expense to plan providers and protecting them from suits for making improper payments, it required that QDROs be specific and clear and allowed plan administrators to approve the QDRO before they would be required to act in accordance with it.

Metropolitan Life Ins. Co. v. Wheaton, 42 F.3d 1080, 1084 (7th Cir. 1994); 29 U.S.C. § 1056(d)(3)(G).

William asserts that ERISA's strict anti-alienation rules preclude Colleen from having a property interest in his pension plans absent a QDRO, which according to the plan administrator she does not have. Accordingly, he argues, Colleen merely has a right to obtain a QDRO and payment, which fits the bankruptcy code's definition of debt. Colleen concedes that the plan administrator was within his rights to determine that the state court order did not qualify as a QDRO, but maintains that she has a nondischargeable interest in a portion of the pension proceeds.

[3] The Bankruptcy Code provides for the discharge of all debts that are the personal liability of the debtor and that arose before the debtor filed for bankruptcy under title 11. 11U.S.C. §§ 's 524 and 727(a). Debt is defined as a "liability on a claim,"11U.S.C. § 101(12), and claim is broadly defined to include a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." 11 U.S.C. § 101(5). Debts incurred as a result of

divorce, including property settlement debts,[1] are dischargeable except to the extent they represent obligations in the nature of alimony, maintenance, or support. 11 U.S.C. § 523. The award of a portion of pension benefits may constitute a property settlement that will be discharged in bankruptcy if it is determined to be a debt.

[4] We find that Colleen's interest is not a dischargeable debt. Firstly, we agree with the BAP that Colleen's claim is against the United Pilot's pension plans and not against William. *See Gendreau,* 191 B.R. at 802. Therefore, the claim is not a personal liability of William that could be discharged by his bankruptcy.

The order required United to pay directly to Colleen her share of the proceeds and instructed the plan administrator to separately account for the portion awarded to Colleen until the benefits are distributed and provided that the "benefits awarded by this Order shall not be assigned, pledged, or otherwise transferred, voluntarily or involuntarily, before [Colleen] has

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[1] The 1994 Amendments to the Bankruptcy Code included a change to section 523 making property settlement debts incurred in divorce proceeding nondischargeable. 11 U.S.C. section 523(a)(15). Because William filed his petition before the effective date of the amendments, it is not applicable to this case.

received those benefits." Also, ERISA provides that "[during any period in which the issue of whether a domestic relations order is a qualified domestic relations order is being determined (by the plan administrator, by a court of competent jurisdiction, or otherwise), *the plan administrator shall* segregate in a separate account in the plan or in an escrow account the amounts which would have been payable to the alternate payee [Colleen] during such period . . . ." 29 U.S.C. § 1056(d)(3)(H)(i) (emphasis added).

[5] If the plans failed to pay Colleen, her recourse would be to sue the plans, not William. *See id.* at 802 ("To obtain the pension funds, [Colleen] would file a civil court action against the administrator. [Colleen's] claim is against United, not the Debtor.") In no way can William be personally liable to Colleen for this money, so it cannot be a personal debt of William's that is dischargeable in bankruptcy. Even if Colleen did not have a QDRO at the time William filed for bankruptcy, his bankruptcy cannot eliminate her right to obtain a QDRO and seek payment from a *different* party.

[6] Likewise, we agree with the BAP that the order by the Family Court, if not itself a proper QDRO, at least gave

Colleen a right to obtain a proper QDRO that could not be discharged in William's bankruptcy proceeding. Colleen's interest in the pension plans (or, at a minimum, her right to obtain a QDRO which would in turn give her an interest in the plans) was established under state law at the time of the divorce decree. *See id.* at 803. William's interest in the plans was limited at that time, or at least subject to being limited at any time Colleen obtained a QDRO (much like a current property owner's rights may be subject to divestment by a contingent interest). *See id.* at 802-3. Bankruptcy recognizes state property rights, and filing bankruptcy cannot give a debtor a greater interest in an asset than that which he owned pre-bankruptcy. Id. at 802. Whether or not Colleen's domestic relations order, as issued, was a QDRO is irrelevant: The QDRO provisions of ERISA do not suggest that Colleen has no interest in the plans until she obtains a QDRO, they merely prevent her from enforcing her interest until the QDRO is obtained. *See id.* at 804 n.4. William did not file bankruptcy before Colleen had an interest in the plans - he filed bankruptcy before the plan administrator was authorized under ERISA to pay her according to that interest. As such, Colleen does not have an unmatured

"debt" against William that is dischargeable in bankruptcy; rather, Colleen has a claim to her own interest in the plans that will be enforceable when the domestic relations order is approved as a QDRO.

[7] Finally, allowing William to cut off Colleen's interest in the pension plans because of the timing of his bankruptcy petition would be contrary to both ERISA and bankruptcy purposes. William filed his petition after the plan administrator concluded the order did not qualify as a QDRO but before it was modified for compliance. The Family Court retained jurisdiction to make any changes that might be deemed necessary by the plan administrator. Likewise, the plan administrator anticipated that it may require multiple drafts of the order to meet QDRO specifications as is evident in his letter to Colleen offering "to review the draft revised QDRO before it is entered by the court.... [and to] given any comments [he] may have." Finally, ERISA itself accommodates for periods when the status of a QDRO is at issue. *See* 29 U.S.C. § 1056(d)(3)(H)(i).

[8] As noted above, the purpose of the QDRO exception was to protect the financial security of divorcees. This protection would be meaningless if

William could thwart his spouse's interest by filing bankruptcy before she obtained a QDRO, a process which everyone (including Congress) recognizes as time-consuming. Furthermore, the result would be a windfall to William and would not further bankruptcy's goal of accumulating a pool of assets to be distributed among creditors. William exempted his interest in the pension plan from the bankruptcy estate. Thus, discharging Colleen's interest in the plans would not enlarge the pool of assets available to William's creditors, it would only enlarge his personal wealth.

CONCLUSION

ERISA section 1056 permits a state court to apportion pension proceeds pursuant to state domestic relations laws so long as the order complies with the section's QDRO requirements. Whether Colleen had acquired a QDRO at the time of William's bankruptcy, however, is irrelevant for the purposes of this appeal. Colleen does not have a personal claim against William that could be discharged by his bankruptcy - her rights are against United. Furthermore, William's rights to United's pension plans were limited, or subject to limitation by Colleen, at the time of the divorce decree and he cannot

use bankruptcy to obtain a greater interest in an asset than that which he possessed prior to bankruptcy. Finally, to allow William to cut off Colleen's right to obtain a QDRO based on the timing of his bankruptcy petition would subvert Congress' efforts to safeguard the financial interests of plan participants' spouses and protect plan administrators from inconsistent claims on pension proceeds, without furthering bankruptcy's goal of preserving a pool of assets to be divided among the debtor's creditors. Accordingly, we hold that Colleen's claim against the pension plan for a portion of the benefits is not discharged by William's bankruptcy petition.

AFFIRMED.

APPENDIX D

UNITED STATES BANKRUPTCY APPELLATE
PANEL
OF THE NINTH CIRCUIT

FILED
Nancy B.Dickerson, Clerk
U.S. BKCY. APP. PANEL
Of THE NINTH CIRCUIT
BAP No. NV-94-1832-HaMeAs
Adversary No. 93-3119

In re

WILLIAM O. GENDREAU,
Debtor,

WILLIAM O. GENDREAU,
Appellant,

ORDER

V.

COLLEEN RAE GENDREAU,
Appellee.

MEYERS AND ASHLAND, Bankruptcy Judges:

The appellant filed a motion for rehearing in which he argued that the Panel erred in assuming he would not be eligible to collect pension benefits until 1999.

In response to the motion, the Panel has amended its opinion so as to delete any reference to the eligibility date. The following have been deleted from the opinion: the sentence formerly on page 2, lines 15-16; the clause formerly on page 5, lines 24-25; and footnote 6 formerly on page 14 of the opinion.

Because the date on which the appellant is eligible to collect benefits is immaterial to the Panel's analysis and holding in this appeal, the motion for rehearing is hereby ORDERED DENIED.

HAGAN, Bankruptcy Judge:

I concur in this Order.

APPENDIX E

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

F I L E D
SEPTEMBER 29 1997
Cathy A. Catterson, Clerk
U.S. Court of Appeals

In re: WILLIAM O. GENDREAU,
Debtors,

WILLIAM O. GENDREAU,
Appellant,

O R D E R

v.

COLLEEN RAE GENDREAU,
Appellee.

No. 96-15432
BAP No. NV-94-01832-HMeAs

Before: HUG, Chief Judge, CHOY and HAWKINS, Circuit Judges.

The panel has voted to deny appellant's petition for rehearing. Judges Hug and Hawkins have voted to reject the suggestion for rehearing en banc and Judge Choy so recommends.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. _Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

APPENDIX F

§ 523 BANKRUPTCY CODE

SECTION 523 (11 U.S.C. § 523)

Exceptions to discharge.
§ 523

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt-

(1) for a tax or a customs duty-

(A) of the kind and for the periods specified in section 507(a)(2) or 507(a)(7) of this title, whether or not a claim for such tax was filed or allowed:

(B) with respect to which a return, if required-

(i) was not filed; or

(ii) was filed after the date on which such return was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition; or

(C) with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax;

(2) for money, property, services, or an extension, renewal,
or refinancing of credit, to the extent obtained by-

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;

(B) use of a statement in writing-

(i) that is materially false;

(ii) respecting the debtor's or an insider's financial condition-,

(iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and

(iv)that the debtor caused to be made or published with intent to deceive, or

(C) for purposes of subparagraph (A) of this paragraph, consumer debts owed to a single creditor and aggregating

more than $500 for "luxury goods or services"

(D) incurred by an individual debtor on or within forty days before the order for relief under this title, or cash advances aggregating more than $1,000 that are extensions of consumer credit under an open end credit plan obtained by an individual debtor on or within twenty days before the order for relief under this title, are presumed to be nondischargeable: "luxury goods or services" do not include goods or services reasonably acquired for the support or maintenance of the debtor or a dependent of the debtor-, an extension of consumer credit under an open end credit plan is to be defined for purposes of this subparagraph as it is defined in the Consumer Credit Protection Act (15 U.S.C. 1601 *et seq.);*

(3) neither listed nor scheduled under section 52 1 (1) of this title, with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit-

(A) if such debt is not of a kind specified in paragraph (2), (4), or (6) of this subsection, timely

filing of a proof of claim, unless such creditor had notice or actual knowledge of the case in time for such timely filing; or

(B) if such debt is of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim and timely request for a determination of dischargeability of such debt under one of such paragraphs, unless such creditor had notice or actual knowledge of the case in time for such timely filing and request;

(4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny;

(5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that-

(A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise (other than debts assigned pursuant to section 402(a)(26) of the Social Security Act, or any such debt which has been assigned to the Federal Government or to a State or any political subdivision of such State); or

(B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support;

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity;

(7) to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty-

(A) relating to a tax of a kind not specified in paragraph

(1) of this subsection, or

(B) imposed with respect to a transaction or event that occurred before three years before the date of the filing of the petition;

(8) for an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship or stipend, unless-

(A) such loan, benefit, scholarship, or stipend overpayment first became due more than 7 years (exclusive of any applicable suspension of the repayment period) before the date of the filing of the petition; or

(B) excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents;

(9) for death or personal injury caused by the debtor's operation of a motor vehicle if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or another substance;

(10) that was or could have been listed or scheduled by the debtor in a prior case concerning the debtor under this title or under the Bankruptcy Act in which the debtor waived discharge, or was denied a discharge under section 727(a)(2), (3), (4), (5), (6), or (7) of this title, or under section 14c (1), (2), (3), (4), (6), or (7) of such Act; or

(11) provided in any final judgment, unreviewable order, or consent order or decree entered in any court of the United States or of any State, issued by a Federal depository institutions regulatory agency, or contained in any settlement agreement entered into by the debtor, arising from any act of fraud or defalcation while acting in a fiduciary capacity committed with respect to any depository institution or insured credit union; or

(12) for malicious or reckless failure to fulfill any commitment by the debtor to a Federal depository institutions regulatory agency to maintain the capital of an insured depository institution, except that this paragraph shall not extend any such commitment which would otherwise be terminated due to any act of such agency.

(b) Notwithstanding subsection (a) of this section, a debt that was excepted from discharge under subsection (a)(1), (a)(3), or (a)(8) of this section, under section 17a(1), 17a(3), or 17a(5) of the Bankruptcy Act, under section 439A of the Higher Education Act of 1965 (20 U.S.C. 1087-3), or under section 733(g) of the Public Health Service Act (42 U.S.C. 294f1 in a prior case concerning the debtor under this title, or under the Bankruptcy Act, is dischargeable in a case under this title unless, by the terms of subsection (a) of this section, such debt is not dischargeable in the case under this title.

(c)(1) Except as provided in subsection (a)(3)(B) of this section, the debtor shall be discharged from a debt of a kind specified in paragraph (2), (4), or (6) of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge under paragraph (2), (4), or (6), as the case may be, of subsection (a) of this section.

(2) Paragraph (1) shall not apply in the case of a Federal depository institutions regulatory agency seeking, in its capacity as

conservator, receiver, or liquidating agent for an insured depository institution, to recover a debt described in subsection (a) (2), (a) (4), (a) (6), or (a) (I 1) owed to such institution by an institution-affiliated party unless the receiver, conservator, or liquidating agent was appointed in time to reasonably comply, or for a Federal depository institutions regulatory agency acting in its corporate capacity as a successor to such receiver, conservator, or liquidating agent to reasonably comply, with subsection (a)(3)(B) as a creditor of such institution affiliated party with respect to such debt.

(d) If a creditor requests a determination of dischargeability of a consumer debt under subsection (a) (2) of this section, and such debt is discharged, the court shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding if the court finds that the position of the creditor was not substantially justified, except that the court shall not award such costs and fees if special circumstances would make the award unjust.

(e)Any institution-affiliated party of a depository institution or insured credit union shall be considered to be

acting in a fiduciary capacity with respect to the purposes of subsection (a)(4) or (11).

APPENDIX F

28 U.S.C. § 157

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b) (1) Bankruptcy judges may hear and determine all cases under title 11

(c) and all core proceedings arising under title 11, or arising in a case under title 11 referred

(d) under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to-

(A) matters concerning the administration of the estate:

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a

(C) plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

(C) counterclaims by the estate against persons filing claims against the estate;

(D) orders in respect to obtaining credit;

(E) orders to turn over property of the estate;

(F) proceedings to determine, avoid, or recover preferences;

(G) motions to terminate, annul, or modify the automatic stay;

(H) proceedings to determine, avoid , or recover fraudulent conveyances;

(I) determinations as to the dischargeability of particular debts;

(J) objections to discharges;

(K) determinations of the validity, extent, or priority of liens;

(L) confirmations of plans;

(M) orders approving the use or lease of property, including the use of cash collateral;

(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate; and

(0) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims.

(3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11. A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.

(4) Non-core proceedings under section 157(b)(2)(B) of title 28, United States Code, shall not be subject to the mandatory abstention provisions of section 1334(c)(2).

(5) The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the

(6) district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

(c)(1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

(2) Notwithstanding the provisions of paragraph (1) of this subsection,

the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

(d) The district court may withdraw, in whole or in part, any case or proceeding

(e) referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

APPENDIX F

Section 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; (2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented; (3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the

entire matter in controversy.
(June 25, 1948, c. 646, § 1, 62 Stat. 928.)

APPENDIX F

28 U.S.C. § 1334. Bankruptcy cases and proceedings.

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

[c](1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law

(2) claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall absent from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction. Any decision to abstain or not abstain mad under this subsection is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title. This subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

(d)The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdistion of all of the property, wherever, located, of the debtor as of the commencement of such case, and of property of the estate.

Appendix F

1056(d). Assignment or alienation of plan benefits.

(1) Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.

(2) For the purposes of paragraph (1) of this subsection, there shall not be taken into account any voluntary and revocable assignment of not to exceed 10 percent of any benefit payment, or of any irrevocable assignment or alienation of benefits executed before the date of enactment of this Act [enacted Sept. 2, 1974]. The preceding sentence shall not apply to any assignment or alienation made for the purposes of defraying plan administration costs. For purposes of this paragraph a loan made to a participant or beneficiary shall not be treated as an assignment or alienation if such loan is secured by the participant's accrued nonforfeitable benefit and is exempt from the tax imposed by section 4975 of the Internal Revenue Code of 1986 [26 USCS section 4975] (relating to tax on prohibited transactions) by reason of section 4975(d)(1) of such Code [26 USCS section 4975(d)(1)].

(3) (A) Paragraph (1) shall apply to

(4) the creation, assignment, or recognition of a right to any benefit payable with respect to a participant pursuant to a domestic relations order, except that paragraph (1) shall not apply if the order is determined to be a qualified domestic relations order. Each pension plan shall provide for the payment of benefits in accordance with the applicable requirements of any qualified domestic relations order.

(B) For purposes of this paragraph-

(i) the term "qualified domestic relations order" means a domestic relations order-

(I) which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan, and

(II) with respect to which the requirements of subparagraphs (C) and (D) are met, and

(ii) the term "domestic relations order" means any judgment, decree, or order (including approval of a property settlement agreement) which-

(I) relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant, and

(II) is made pursuant to a State domestic relations law (including a community property law).

(C) A domestic relations order meets the requirements of this subparagraph only if such order clearly specifies-

(i) the name and the last known mailing address (if any) of the participant and the name and mailing address of each alternate payee covered by the order,

(ii) the amount or percentage of the participant's benefits to be paid by the plan to each such alternate payee, or the manner in which such amount or percentage is to be determined.

(iii) the number of payments or period to which such order applies, and

(iv) each plan to which such order applies.

(D) A domestic relations order meets the requirements of this subparagraph only if such order-

(i) does not require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan,

(ii) does not require the plan to provide increased benefits (determined on the basis of actuarial value), and

(iii) does not require the payment of benefits to an alternate payee which are required to be paid to another alternate payee under another order previously determined to be a qualified domestic relations order.

(E) (i) A domestic relations order shall not be treated as failing to meet the requirements of clause (i) of subparagraph (D) solely because such order requires that payment of benefits be made to an alternate payee-

(I) on or in the case of any payment before a participant has separated from service, after the date on which the participant attains (or would have attained) the earliest retirement age,

(II) as if the participant had retired on the date on which such payment is to begin under such order (but taking into account only the present value of benefits actually accrued and not taking into account the

present value of any employer subsidy for early retirement), and

(III) in any form in which such benefits may be paid under the plan to the participant (other than in the form of a joint and survivor annuity with respect to the alternate payee and his or her subsequent spouse).

For purposes of subclause (II), the interest rate assumption used in determining the present value shall be the interest rate specified in the plan or, if no rate is specified, 5 percent.

(ii) For purposes of this subparagraph, the term "earliest retirement age" means the earlier of-

(I) the date on which the participant is entitled to a distribution under the plan, or

(II) the later of the date of the participant attains age 50 or the earliest date on which the participant could begin receiving benefits under the plan if the participant separated from service.

(F) To the extent provided in any qualified domestic relations order-

(i) the former spouse of a participant shall be treated as a surviving

spouse of such participant for purposes of section 205 [29 USCS section 1055] (and any spouse of the participant shall not be treated as a spouse of the participant for such purposes), and

(ii) if married for at least 1 year, the surviving former spouse shall be treated as meeting the requirements of section 205(f) [29 USCS section 1055(f)].

(G) (i) In the case of any domestic relations order received by a plan-

(I) the plan administrator shall promptly notify the participant and each alternate payee of the receipt of such order and the plan's procedures for determining the qualified status of domestic relations orders, and

(II) within a reasonable period after receipt of such order, the plan administrator shall determine whether such order is a qualified domestic relations order and notify the participant and each alternate payee of such determination.

(ii) Each plan shall establish reasonable procedures to determine the qualified status of domestic relations orders and to administer distributions under such qualified orders. Such procedures-

(I) shall be in writing,

(II) shall provide for the notification of each person specified in a domestic relations order as entitled to payment of benefits under the plan (at the address included in the domestic relations order) of such procedures promptly upon receipt by the plan of the domestic relations order, and

(III) shall permit an alternate payee to designate a representative for receipt of copies of notices that are sent to the alternate payee with respect to a domestic relations order.

(H) (i) During any period in which the issue of whether a domestic relations order is a qualified domestic relations order is being determined (by the plan administrator, by a court of competent jurisdiction, or otherwise), the plan administrator shall separately account for the amounts (hereinafter in this subparagraph referred to as the "segregated amounts") which would have been payable to the alternate payee during such period if the order had been determined to be a qualified domestic relations order.

(ii) If within the 18-month period described in clause (v) the order (or modification thereof) is

determined to be a qualified domestic relations order, the plan administrator shall pay the segregated amounts (including any interest thereon) to the person or persons entitled thereto.

(iii) If within the 18-month period described in clause (v)-

(I) it is determined that the order is not a qualified domestic relations order, or

(II) the issue as to whether such order is a qualified domestic relations order is not resolved,

then the plan administrator shall pay the segregated amounts (including any interest thereon) to the person or persons who would have been entitled to such amounts if there had been no order.

(iv) Any determination that an order is a qualified domestic relations order which is made after the close of the 18-month period described in clause (v) shall be applied prospectively only.

(v) For purposes of this subparagraph, the 18-month period described in this clause is the 18-month period beginning with the date on which the first payment would be required to be made under the domestic relations order.

(I) If a plan fiduciary acts in accordance with part 4 of this subtitle [29 USCS section 1101 et seq.] in-

(i) treating a domestic relations order as being (or not being) a qualified domestic relations order, or

(ii) taking action under subparagraph (H),

then the plan's obligation to the participant and each alternate payee shall be discharged to the extent of any payment made pursuant to such Act.

(J) A person who is an alternate payee under a qualified domestic relations order shall be considered for purposes of any provision of this Act a beneficiary under the plan. Nothing in the preceding sentence shall permit a requirement under section 4001 [29 USCS section 1301] of the payment of more than 1 premium with respect to a participant for any period.

(K) The term "alternate payee" means any spouse, former spouse, child, or other dependent of a participant who is recognized by a domestic relations order as having a right to receive all, or a portion of, the benefits payable under a plan with respect to such participant.

(L) This paragraph shall not apply to

any plan to which paragraph (1) does not apply.

(M) Payment of benefits by a pension plan in accordance with the applicable requirements of a qualified domestic relations order shall not be treated as garnishment for purposes of section 303(a) of the Consumer Credit Protection Act [15 USCS section 1673(a)].

(N) In prescribing regulations under this paragraph, the Secretary shall consult with the Secretary of the Treasury.